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No. 04-340

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

SAN REMO HOTEL, L.P., THOMAS FIELD, ROBERT FIELD, AND T & R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE HONORABLE STEVE CHABOT, CHAIR, SUBCOMMITTEE ON THE CONSTITUTION, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES IN SUPPORT OF PETITIONERS SAN REMO HOTEL, L.P., *ET. AL.*

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Page

TABLE OF CONTENTS

Interest of the Honorable Steve Chabot 1

Summary Of Argument 2

Argument:

This Court Should Resolve The Conflicting Interpretations Of *Williamson County* In A Manner That Restores The Right Of Property Owners To Pursue Taking Claims In Federal Court, And Provides Congress With Greater Guidance Regarding The Supreme Court's Understanding Of Constitutional Protections Of Property Rights 3

Conclusion 8

TABLE OF AUTHORITIES

Cases:

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 6, 7

City of Monterey v. Del Monte Dunes, 526 U.S. 697 (1999) 3, 5

Reahard v. Lee County, 30 F.3d 1412 (11th Cir. 1994) 5

Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 188 (2d Cir. 2003), *cert. denied*, 73 U.S.L.W. 3211 (2004) 5, 6

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) ..... *passim*

Page

Federal Statutes:

28 U.S.C. §1441(a) 4

Other:

H.R. Rep. No. 106-518 . . . . . 4, 5

J. Delaney and D. Desiderio, "Who Will Clean Up the 'Ripeness Mess'? A Call for Reform So Takings Plaintiffs Can Enter the Door of the Federal Courthouse," 31 Urb. Law. 195 (1999) 4

G. Overstreet, "The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions," 10 J. Land Use & Envtl. L. 91 (1994) 4

BRIEF OF THE HONORABLE STEVE CHABOT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS SAN REMO HOTEL L.P., *ET AL.*

The Honorable Steve Chabot, Chair of the Subcommittee on the Constitution of the Judiciary Committee of the U.S. House of Representatives, has received the consent of the parties to file this brief as *amicus curiae* through blanket letters of consent filed with the Clerk of the Court.[1]

INTEREST OF THE HONORABLE STEVE CHABOT, CHAIR OF THE SUBCOMMITTEE ON THE CONSTITUTION OF THE JUDICIARY COMMITTEE OF THE U.S. HOUSE OF REPRESENTATIVES, AS *AMICUS CURIAE*

The jurisdiction of the House Subcommittee on the Constitution includes the constitutional protection of private property rights. It is with an appreciation of the gravity of this appeal that Chairman Chabot submits this brief to respectfully urge the Court to reverse the decision of the Ninth Circuit in a manner that will restore the right of property owners to have Fifth Amendment taking claims adjudicated on the merits in the federal courts.

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[1] Pursuant to Rule 37.6 of the Court, counsel for the *amicus curiae* discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no person or entities other than the *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

The Subcommittee determined several years ago that this right is being severely restricted if not extinguished by the current application of the so-called "state court requirement" of this Court's 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172.

SUMMARY OF ARGUMENT

Between 1997 and 2000, the Subcommittee on the Constitution of the Judiciary Committee of the U.S. House of Representatives inquired into the impact of this Court's requirement, formulated in 1985 in *Williamson County*, that property owners must pursue taking claims in State court before their Fifth Amendment taking claims may be adjudicated by a federal court. The Subcommittee determined that *Williamson County* has almost universally denied property owners the ability to have a federal court determine the merits of a Fifth Amendment taking claim. As a result, in 2000 the Subcommittee and the House of Representatives passed H.R. 2372, the Private Property Rights Implementation Act of 2000, in order to "simplify and expedite access to the Federal courts," but without altering substantive Fifth Amendment takings claim standards. Consistent with that bill, the *amicus curiae* respectfully submits that this Court should resolve the current conflict among the federal courts regarding access to the federal courts in a manner that eliminates or at least mitigates the obstacles that have resulted from *Williamson County* and provides guidance to Congress regarding the Supreme Court's understanding of the current scope of property rights protection.

ARGUMENT

THIS COURT SHOULD RESOLVE THE CONFLICTING INTERPRETATIONS OF *WILLIAMSON COUNTY* IN A MANNER THAT RESTORES THE RIGHT OF PROPERTY OWNERS TO PURSUE TAKING CLAIMS IN FEDERAL COURT, AND PROVIDES CONGRESS WITH GREATER GUIDANCE REGARDING THE SUPREME COURT'S UNDERSTANDING OF CONSTITUTIONAL PROTECTIONS OF PROPERTY RIGHTS.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court wrote: "[I]f a State provides an adequate procedure for seeking just compensation, the property owner *cannot* claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." *Id.* at 195 (emphasis added). This Court did not say that the federal taking claim co-existed from the outset with the state claim, or that the plaintiffs in *Williamson County* were simply in the wrong forum. Rather, the Court held that a property owner *cannot* bring a federal taking claim until that claim has been litigated in state court and just compensation has been denied. In 1999, this Court reaffirmed this interpretation, holding in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999), that a Fifth Amendment taking claim "does not accrue" until state law and procedures have been utilized.

Williamson County, however, has caused a crisis in procedural takings law, because federal judges have interpreted it so as to avoid addressing the merits of federal takings claims. From 1997 to 2000, the Subcommittee conducted an inquiry into the impact of *Williamson County* on the rights of property owners under the Fifth Amendment's Taking Clause. The Subcommittee was provided with credible research that in 94 percent

of all takings cases litigated between 1983 and 1988,[2] and in 83 percent of the takings claims initially raised in the federal district courts from 1990 to 1998, the federal court never reached the merits of the property owner's claim of a taking without just compensation.[3] Of those property owners who could afford to appeal their cases through the state courts and then proceed in federal court, 64 percent still failed to have their claims resolved on the merits. Moreover, in that small portion of appellate cases where a federal court found a takings claim to be procedurally ripe *and* addressed the merits, it took property owners "on the average, 9.6 years to have an appellate court reach its determination."[4] And these statistics do not address the low income or middle class property owners who, in the face of the expensive procedural challenges that stand between them and a federal forum on the merits of their federal civil rights claims, are too intimidated to even start down the long road to a hearing on the merits in federal court.

During the 106th Congress, Representative Chabot's predecessor as Chair of the House Subcommittee on the Constitution, the Hon. Charles Canady, was the lead sponsor of H.R. 2372,[5] the Private Property Rights

[2] *See* H.R. Rep. No. 106-518, at 10 *citing* G. Overstreet, "The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decision," 10 J. Land Use & Envtl. L. 91, 92 n.3 (1994).

[3] *See ibid, citing* J. Delaney and D. Desiderio, "Who Will Clean Up the 'Ripeness Mess'? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse," 31 Urb. Law. at 202-231 (1999), at 196.

[4] *Ibid.*

[5] 106th Cong. (2d. Sess. 2000).

Implementation Act of 2000. Among other things, H.R. 2372 was designed to address the suppression of individuals' defenses to property rights violations by clarifying and simplifying the procedures governing federal property rights claims in federal court. Most significant to this case, H.R. 2372 would have removed the requirement that property owners litigate their federal takings claims in state court first, in order to ensure that property owners like the Petitioners in this case have a meaningful opportunity to have the federal courts decide their federal takings claims. On March 16, 2000, H.R. 2372 passed the House of Representatives by a vote of 226-182, with Chairman Chabot's support.

The Judiciary Committee's 2000 Report focused precisely on the consequences of *Williamson County* that underlie the instant appeal. The Report discussed the lengthy and expensive litigation required to pursue a taking claim through the state and then federal courts: for example, 14 years in *Del Monte Dunes,* and 13 years in *Reahard v. Lee County,* 30 F.3d 1412 (11th Cir. 1994).[6] The Committee also took note of the application of claim and issue preclusion defenses to bar federal taking claims.[7] The Report concluded: "The effect of the reasoning of these cases is that many property owners end up with *no opportunity* to have their Federal constitutional claims heard in Federal court."[8]

This appeal and the Second Circuit's conflicting decision in *Santini v. Connecticut Hazardous Waste Management Service,* 342 F.3d 118 (2d Cir. 2003), *cert. denied,* 73 U.S.L.W. 3211 (2004), are only the two

[6] *Ibid.* at 6.

[7] *Ibid.* at 8.

[8] *Ibid.* at 9.

most recent cases that illustrate the procedural crisis that has resulted from the *Williamson County* state court requirement and the concerns that prompted H.R. 2372. The *San Remo* case is now in its eleventh year of litigation, without a federal court having ruled on the Petitioners' Fifth Amendment takings claim. In *Santini*, the Second Circuit in 2003 became the first federal court to address the merits of plaintiffs' federal taking claim, which arose from events that occurred from 1991 to 1993. Even then, the Second Circuit, in allowing Santini to proceed and allowing Second Circuit litigants, henceforth, to reserve their federal claim during state court proceedings, effectively affirmed that Santini had been *properly required* to proceed through six years of state court litigation before his federal claim accrued and could even be pursued in federal court.

Thus, these two cases highlight the two consequences of the *Williamson County* state court requirement that have operated together to deny property owners their rights under the Takings Clause of the Fifth Amendment: the length of time in state court necessary to ripen the federal claim, and the property owner's inability to access the federal courts once the state court litigation has terminated.

When inquiring into *Williamson County* and crafting H.R. 2372, the Subcommittee also became aware of the inconsistency between *Williamson County* and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). In *City of Chicago*, this Court held that when constitutionally aggrieved landowners properly file their takings actions in state courts, municipal defendants may remove the cases to federal court. That decision relied on 28 U.S.C. §1441(a), which permits removal of state court actions to federal courts only

where the plaintiff could have initially filed the action in federal court. *Williamson County* and *City of Chicago* are thus irreconcilable: if a municipality may remove a federal taking claim to federal court, then takings plaintiffs *must be allowed* to bring their claims in federal court from the start.

As a result, subsumed in this appeal is a question of great concern to Congress and to Chairman Chabot by virtue of his oversight responsibilities: Does this Court's decision in *City of Chicago* allow plaintiffs to bring their federal takings claims in federal court initially? If so, Congress may not have to pursue federal legislative solutions to the current procedural crisis.

This procedural confusion has left the scope of Fifth Amendment protection of property rights unclear and undetermined, and so has impeded Congress from examining what if any other procedural clarifications or amendments are warranted. Resolution of the conflicting interpretations of *Williamson County* will aid Congress, the Subcommittee on the Constitution, and the Judiciary Committee in understanding its opportunities and obligations to protect the constitutional rights of property owners.

CONCLUSION

This Court should resolve the conflicting interpretations of the *Williamson County* state court requirement in a manner that will restore the rights of property owners to have a federal court adjudicate their Fifth Amendment taking claims and will provide guidance to Congress regarding the Supreme Court's understanding of the scope of constitutional protection of property rights.

Respectfully submitted,

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